Supreme Court, U.S.
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No. 88-1441

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EDWARD J. FLEMING,

Petitioner,

vs.

SHUKI Y. LEVY,
DEBORAH DALE LEVY, and
CHARLES UNDERWOOD,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FIVE

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QUESTION PRESENTED

Assuming arguendo that a party fails to address issues central to an appeal in their briefs, does the Due Process Clause of the Fourteenth Amendment require that the party be afforded an opportunity to file supplemental briefs on appeal or be granted rehearing to address those issues which were central to the appeal and which had previously been briefed by the opposing parties and upon which the Court of Appeals based its decision?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

Respondents Shuki Y. Levy and Deborah Dale Levy (hereinafter collectively referred to as the "Respondents") respectfully request that this Court deny petitioner Edward J. Fleming's ("Petitioner") Petition for Writ of Certiorari (the "Petition") to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five ("Court of Appeal"), rendered on September 13, 1988. This case presents no

issues under the Fourteenth Amendment or any other provisions of the United States Constitution.

Additionally, Petitioner never raised any federal question in the courts below and cannot at this late stage attempt to invoke the jurisdiction of this Court.

Furthermore, Petitioner misstates the facts of this case and incorrectly applies it to the relevant law. Petitioner argues *ad nauseam* that the Court of Appeal reached issues neither briefed nor argued by the parties and that the Court of Appeal thereby extinguished purported property rights vested in Petitioner. Petitioner further argues that the Court of Appeal erred in denying Petitioner mandatory rehearing to address the questions raised by the Court of Appeal in its decision. This is factually incorrect. In fact, the Court of Appeal reached its decision on issues which were briefed by Petitioner in his opening and reply brief and by the Respondent's in their respondents' brief. Petitioner also deftly omits material facts which were relevant to the determination by the Court of Appeal its in ruling against Petitioner.

In summary, Petitioner seeks to convince this Court that after a judgment is entered against him, execution is levied on that judgment, his house is sold under execution and he is dispossessed, and the house is thereafter sold twice to *bona fide* purchasers, Petitioner may then wait over ten years thereafter to file a motion to vacate the judgment and, without notice to the present owners of the house and by misrepresenting facts to the court, obtain an order quieting title in him as against the innocent

purchasers of the house. Not surprisingly, the trial court, Court of Appeal and the California Supreme Court disagreed. In fact, the Court of Appeal has admonished Petitioner and his former counsel for their continued bad faith tactics, and has reported Petitioner's former counsel to the California State Bar for misrepresentations he made to the court. Without those misrepresentations, Petitioner would never have taken Respondents' house.

PARTIES TO THE PROCEEDING

Respondents are Shuki Y. Levy and Deborah Dale Levy, Intervenors before the Superior Court for the State of California in and for Los Angeles County and Respondents in the Court of Appeal. Petitioner is Edward J. Fleming, Cross-Defendant before the Superior Court of the State of California in and for the County of Los Angeles and Appellant/Petitioner in the California Court of Appeal. Other parties affected herein are Thomas R. Morgan, Plaintiff, Cross-Defendant and Appellant, and Charles Underwood, Defendant, Cross-Complainant and Respondent, in the various trial and appellate court proceedings below.

OPINION BELOW

The opinion of the Court of Appeal is unreported and was reproduced (along with the court's order denying petitions for rehearing) as Appendix "A" to the Petition. The orders of the California Supreme Court denying review and denying Petitioner's Petition for Writ of Mandate are

also unreported and are attached as Appendix "B" to the Petition.

JURISDICTION

Respondents dispute that this Court has jurisdiction to review the judgment of the Court of Appeal filed on September 13, 1988 on the grounds, among others, that no federal question was ever raised in the state court proceedings below, the validity of a treaty or statute of the United States was not drawn into question on the grounds of it being repugnant to the Constitution, treaties or laws of the United States, and no title, right, privilege or immunity set up or claimed under federal law is affected by the decision below.

FACTUAL SUMMARY

The facts of this case as established by the record and the Opinion dated September 13, 1989 (the "Opinion") of the Court of Appeal are as follows:

In March 1971, Charles Underwood ("Underwood") obtained a judgment against Petitioner, (Opinion ("OP"):2, Clerk's Transcript ("CT"):72). In 1974, the Los Angeles County Sheriff levied execution pursuant to the judgment against certain real property then owned by Petitioner, located at 2600 Zorada Drive, Los Angeles, California (the "Subject Property") (OP:2, CT:87). Underwood bought the Subject Property at the execution sale and caused Petitioner to be dispossessed. Underwood subsequently sold the Subject Property to the Feldmans for valuable

consideration. The Feldmans were *bona fide* purchasers for value and owned the subject property until May 23, 1978, at which time they sold it to the Respondents for the sum of $210,000.00, which was the fair market value of the Subject Property at that time (OP:3, CT:196/14-18). Respondents had no knowledge at the time they purchased the Subject Property of the litigation between Underwood and Fleming or of any purported defects in title (OP:4, CT:197/18-27). Respondents were, and are, *bona fide* purchasers of the property, (Reporter's Transcript ("RT"): 45/19-22; RT: 46/21-24).

Respondents continued to reside in the Subject Property and pay the taxes thereon for over five years (CT:196/25-28).

On or about April 17, 1986, Respondents returned from a short vacation and were shocked to find that they had been ousted from the Subject Property (CT:197/20-26).

Respondents subsequently discovered that on or about June 4, 1985, Petitioner had filed a Notice of Motion and Motion to Set Aside and Vacate Void Default and Default Judgment, which was heard on or about October 9, 1985 in the case of *Thomas R. Morgan v. Charles Underwood, (Case No. C845685)* (OP:4, CT:190/13-24). Respondents were never served with a copy of the Notice of Motion or the Motion, and were never served with a copy of the lower court's "Order Re Motion of Cross-Defendant Edward J. Fleming To Set Aside And Vacate Void Default and Default Judgment, etc.", which was entered on or about December 6, 1985, or with any notice of said Order, or with

any other order entered in said action. (OP:4, RT:485/18-23)

Furthermore, Respondents have never met, spoken with, nor had any dealings whatsoever involving Thomas R. Morgan, Charles Underwood, Petitioner, nor any other party to the action entitled *Thomas R. Morgan v. Charles Underwood, (Case No. C845685).* (CT:197/7-27)

Upon further investigation, Respondents discovered the existence of Petitioner and this litigation, and they determined that over *ten years* after Petitioner had been dispossessed, and *fourteen years* after the judgment had been entered against him, Petitioner had retained counsel, who, on October 16, 1985, had obtained an order from the court, not only vacating the judgment against him, but also quieting title to the Subject Property in him against all subsequent purchasers of the house (who received no notice of the proceedings) and restoring him to possession (OP:5, CT:190/13-24). Judgment was entered on December 6, 1985. Petitioner thereafter waited until April 1986 and, knowing that Respondents were on vacation in Mexico, caused the Marshal to execute on that order. (OP:6).

As one would expect, the court below did not grant such an order based upon full knowledge of the facts. To the contrary, the order was entered under the mistaken impression by the court, induced by a highly misleading letter (the "Letter") from Petitioner's then counsel, that Underwood was still in possession of the Subject Property (OP:5, CT:44/5-23). A true and correct copy of the Letter is attached to the Opinion. The trial court expressly found

that it would not have entered such an order had it been aware of the existence of *bona fide* purchasers, which, it further found, Respondents are (RT:46/19-24).

At the time of the unopposed hearing on Petitioner's Motion, Petitioner's former attorney, Martin Friedlander ("Friedlander") misled the lower Court and substituted his own discretion in place of the lower court's, by concealing his admitted knowledge of third party ownership of the Subject Property (OP:5-6, RT:44/17-23). At the time of the hearing on Respondents' Application to Modify Order of order of December 6, 1985 and Application Recalling Writ of Possession, etc., Friedlander stated that he did not disclose this fact to the court, and instead relied upon his own "extensive research of the law", which disclosed to him that *bona fide* purchasers such as the Respondents "would not prevail as a matter of law." (RT: 46/14-18, CT:416/24-417/12.)

He therefore did not feel constrained to be candid with the court on this point (OP:4; RT: 46/14-18; CT:416/24-417/12).

On April 23, 1986, having received notice by dispossession, Respondents filed an Ex-Parte Application for Order Correcting Order of December 6, 1985, entered as a result of clerical error or inadvertence; and an Ex-Parte Application for Orders: (1) Recalling Writ of Possession of Real Property; (2) Quashing Levy of Writ of Possession of Real Property; (3) Staying Execution on Order for Possession of Real Property; and (4) Temporary Restraining Order (CT:185-216).

On the same day, Petitioner and Respondents appeared before the Los Angeles Superior Court. The court ordered that Petitioner appear and show cause why the court should not enter the following:

a. An Order permanently enjoining and restraining Petitioner, his agents, etc. from asserting any claim, right, title or interest adverse to the title of Respondents in and to the Subject Property;

b. An Order that the Writ of Possession of Real Property issued by the Court on March 18, 1986 be recalled and that the levy of said Writ of Possession made on or about April 7, 1986 by the Los Angeles County Marshal be quashed;

c. An Order permanently restraining and enjoining Petitioner, his agents, etc. from entering upon, occupying, or claiming any possession or interest whatsoever in the Subject Property; and

d. An Order modifying the lower court's Order of December 6, 1985 by negating the Order's effect on subsequent *bona fide* purchasers for value.

The lower court also issued a Temporary Restraining Order restoring Respondents to possession of the Subject Property pending the hearing on the Order to Show Cause and restraining Petitioner from occupying the Subject Property, selling, transferring, conveying, encumbering and leasing the Subject Property, or interfering in any manner with the rights of Respondents.

On May 23, 1986, the Order to Show Cause on Respondents' Motion for Order Correcting and Modifying

the court's Order of December 6, 1985 came on for hearing in the Superior Court. The court considered all the pleadings, papers, declarations and evidence both in favor and in opposition to the applications of Respondents, and after hearing oral argument, ordered and found that at the time the court granted Petitioner's October 9, 1985 Motion and signed the Order of December 6, 1985, the court had believed that Underwood was then in possession of the Subject Property. The court further found that Petitioner's counsel Martin S. Friedlander had known prior to October 9, 1985, that Underwood had transferred title to the Subject Property to third parties, but had failed to disclose this underlying material fact to the court at any time prior to May, 1986 (OP:5-6; RT:46/5-24; CT:484/17-23).

By order dated June 6, 1986 the court found that Respondents never had notice of Petitioner's Motion, were not served with any Notice of said Motion, nor did they appear at the hearing on the Motion. The court stated that it would not have signed the Order of December 6, 1985 had it been aware that Underwood was not in possession of the Subject Property (CT:485/2-26). The court further ordered that Respondents' Application to Intervene was granted; that the Writ of Possession of Real Property issued on or about March 18, 1986 was recalled and quashed; that the levy of said Writ of Possession made on or about April 7, 1986 was quashed, vacated and declared to be of no force or effect, and Respondents were restored to immediate possession of the Subject Property and restored to the position they were in immediately prior to

December 6, 1985 with respect to the Subject Property; that the court's Order of December 6, 1985 which was recorded in the Official Records of Los Angeles County was declared to be of no force or effect with respect to the title to, or the right to possession of, the Subject Property; and that the Court modified its Order of December 6, 1985, to reflect that it only intended to grant relief against Underwood (CT:486/17 - 489/13).

Petitioner appealed from the June 6, 1986 post-judgment order. In the interest of justice, the Court of Appeal reversed the trial court by vacating both the June 6, 1986 order *and* the December 6, 1985 order, and directed the trial court to deny with prejudice Petitioner's underlying motion for relief.

The Court of Appeal based its decision in vacating the December 6, 1985 judgment on two grounds. First, the court noted that the 1971 judgment which Petitioner had attempted to set aside in 1985 was valid on its face. Accordingly, the court concluded that Petitioner had a reasonable period of time -- pursuant to California Code of Civil Procedure §473a, one year -- in which to move to set aside the judgment. Since Petitioner had waited *fourteen years* to do so, the court stated that as a matter of law, Petitioner's motion to vacate the 1971 judgment was not brought within a reasonable time of his having actual knowledge of the judgment and, accordingly, that the 1985 judgment must be vacated. (OP:23)

Moreover, the court stated as a separate basis of jurisdiction that Petitioner's unclean hands allowed the

court to intervene and vacate the December 6, 1985 judgment in the interest of justice. (OP:23-30).

The Court of Appeal further found Petitioner's conduct to be "an act akin to lying in wait, [Fleming] chose to execute on his judgment four months later during the period when Respondents had begun to move out of the house in preparation for its sale and were on vacation in Mexico." (OP:29-30). The court concluded that *"Fleming's acts show[ed] not only bad faith but contempt for the administration of justice [and that] public policy and the integrity of the Court demand that Fleming be denied all requested relief on the ground that he proceeded with unclean hands"*, and on that basis vacated the December 6, 1985 judgment. (OP:27) (Emphasis added.)

Petitioner then filed a petition for rehearing in the Court of Appeal alleging that pursuant to California Government Code Section 68081 the Court of Appeal was required to grant him a rehearing on the alleged ground that Petitioner had not been given the opportunity to brief the issues raised in the Court of Appeal and set forth its decision. The petition was denied.

Petitioner's Petition is purportedly based on the ground that Petitioner was denied due process when the Court of Appeal denied his Petition for Rehearing and that the Court of Appeal was required, pursuant to California Government Code §68081, to grant Petitioner's petition for rehearing, which was denied on October 12, 1988.

However, Petitioner's claim is spurious. Petitioner has misunderstood the purpose behind Government Code

§68081. Government Code §68081 does not require that the court afford Petitioner the opportunity to brief the issues raised by the Court of Appeal decision as a matter of right. Section 68081 provides only that if an issue was not briefed by *any party to the proceeding, the Court shall then afford the parties an opportunity to provide supplemental briefing*. In the present case, the merits of the December 6, 1985 order and Petitioner's unclean hands were briefed by Petitioner both in his opening and reply brief, *and* by Respondents in their Respondents' Brief. This was recognized by the Court of Appeal, which properly denied Petitioner's petition for rehearing.

Accordingly, Petitioner's current petition for writ of certiorari must be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. Petitioner Never Raised A Federal Question In The State Court Proceedings Below.

Under 28 U.S.C. §1257, in order to invoke the jurisdiction of this Court, it is essential that a substantial federal question have been raised below. This Section states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is *drawn in question* on the ground

> of it being repugnant to the Constitution, treaties or law of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaty or statutes of, or commission held or authority exercised under, the United States." (Emphasis added.)

See, also, Stern, Gressman & Schapiro, *Supreme Court Practice* 6th Edition (1988), §3.19 p. 144.

The rationale behind this requirement is that the state courts be given the first opportunity to pass upon federal challenges to state action, thereby acknowledging the competence of state courts to adjudicate federal constitutional claims. *Allen vs. McCurry*, 449 U.S. 90, 105 (1980). An additional rationale is that in state court cases in which federal questions are not raised the records are often inadequate, and it is important in the federal system that state courts be given the first opportunity to consider the applicability of state statutes or procedures in light of federal constitutional challenge since the statutes or procedures may construed a way which saves their constitutionality. *Cardinale vs. Louisiana*, 394 U.S. 437, 439 (1969).

In the instant case, Petitioner never raised or "drew into question" any federal question prior to bringing his Petition for Writ of Certiorari. Such question was never raised before the Los Angeles Superior Court, the

California Court of Appeal or the California Supreme Court. Additionally, Petitioner not only failed to specifically raise a federal question in the lower courts, but also failed to make reference to any particular clause of the federal constitution upon which he now claims rights. Therefore, it is clear that the Petition for Writ of Certiorari must be denied.

2. The Right Of Appeal Is Not Essential To Due Process.

Petitioner acknowledges in the Petition that appellate review and petitions for rehearing are not essential elements of due process of law. *See, e.g., Ohio Ex rel. Bryant vs. Akron Metropolitan Park. Dist.*, 281 U.S. 74, 80 (1930). However, Petitioner goes on to argue that due process does apply to appeals and petitions for rehearing when due process was not afforded at any stage of the proceedings. While this may be true, it is not applicable to this case. In this action, Petitioner had ample opportunity to present his case at the trial court level. After extensive briefing and argument of counsel, the lower court ruled that Petitioner was not entitled to the relief which the court had previously granted him on the grounds, among others, of laches, unclean hands and intentional misrepresentations to the court. Despite these findings (which findings were set forth in detail in the opinion of the Court of Appeal), Petitioner argues that he did not have the opportunity to brief these issues which were all discussed, at length, by the lower court and by Respondents in their briefs before the Court of Appeal. It cannot realistically be argued

that the parties were denied the opportunity to brief the issues on which the Court of Appeal based its determination. However, this Court need not even address that question because Petitioner was afforded due process at the lower court level and, therefore, was not entitled to due process at the Court of Appeal.

3. The Appellate Court Properly Denied Petitioner's Petition For Rehearing

a. The Parties Briefed All Issues Which Were Relevant To This Court's Determination On Appeal

Petitioner argues that the Court of Appeal should have granted his Petition for Rehearing on the grounds that it never afforded him an opportunity to present his position on (a) the merits on the December 6, 1985 judgment and (b) whether he had unclean hands. First, as shown below, this is untrue. Second, Government Code §68081 does not require that the Court afford *Petitioner* the opportunity to brief these issues through supplemental briefs, but instead, Section 68081 provides that if an issue "... was not proposed or briefed by *any party* to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing...." Government Code §68081 (emphasis added).

The merits of the December 6, 1985 order and Petitioner's unclean hands were briefed by Petitioner both

in his Opening and Reply Briefs.[1/] Petitioner's Opening Brief discussed these issues, among other places, at pages 2 (where Petitioner incorporates his June 4, 1985 motion by reference), 3, 9, 10, 14, 15 and 25. Additionally, these issues were briefed by Respondents in their Respondents' Brief at pages 1, 2, 5, 6, 8, 9, and at page 23 where Respondents' brief stated:

> "In the present case, Petitioner had notice of Underwood's judgment against him at least since 1975, when Underwood had the sheriff forcibly evict the Fleming from the Subject Property after the execution sale. After doing *absolutely nothing* to challenge that judgment for over *10 years*, Fleming is in no position to now claim a right in 'equity' against the Respondents. It is well established that 'the law helps the vigilant, before those who sleep on their rights.'

Additionally, Respondents' brief cited the Reporter's Transcript ("RT") at 43/19-24, quoting Judge George as stating:

> "On the basis of the record before me I find that Mr. Fleming, and I am speaking of Mr. Fleming as a party and not Mr. Friedlander or his law firm, had no justification for the 11 years of

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1/ Although the briefs did not specifically utilize the term "unclean hands" each and every element of unclean hands was discussed.

> delay in seeking the relief which Mr. Fleming sought in court with reference to the conveyance from Underwood to Fleming ...." (Respondents' Brief at 23-24 quoting R.T. 43/19-24).

Furthermore, Respondents discussed, at length, in their brief the misrepresentations and omissions in Friedlander's letter of November 20, 1985. (Respondents' Brief at 16-17.)

Respondents also quoted Judge George stating:

> "I also would note that Mr. Fleming's present counsel should have by way of supplemental written presentation or orally at the time of the hearing on October 9, 1985, brought to the Court's attention the fact that Mr. Underwood was no longer in possession and in fact there were good faith purchasers or at least purchasers who might be purchasers in good faith in existence inasmuch as that was a material consideration for the Court.
>
> There is, as I noted in the admission orally by Mr. Friedlander today and concession in his declaration of May 19, 1986, that prior to October 9, he knew that there were in fact subsequent purchasers from Mr. Underwood.
>
> I also would also note that the papers filed, specifically the June 4, 1985 written motion that was heard in October by me in the

> law and motion department, Department 84, did most definitely convey the impression and certainly gave no hint of there being subsequent purchasers, certainly not subsequent purchasers in good faith." (Respondents' Brief at 14 citing R.T.: 44/5-23.)

Respondents additionally briefed the issue of the merits of the December 6, 1985 judgment at page 24 of their brief. Respondents quoted the lower court in stating:

> "I also come to the conclusion that in any event that somebody involved in these proceedings must go to court against the title company, that given the delay and all other circumstances I have alluded to, it is more equitable that Mr. Fleming, with his laches *and other conduct*, be the one to have to obtain monetary damages from the title company or some prior title holder rather than the Levy's who in good faith and in the court's opinion without any negligence or transgression committed by them with regard to these various proceedings." (Respondents' Brief at 24/-25 citing R.T. 45/13-22).

Furthermore, the lower court specifically found that Petitioner or his former counsel specifically misrepresented facts to the court in seeking to set aside the default judgment.

b. Petitioner Briefed The Issue Regarding The Merits Of The December 6, 1985 Judgment In His Opening Brief

Petitioner's former counsel also attempted to mislead the Court of Appeal in the Petition for Rehearing. Petitioner alleged that he had never briefed the issue of the merits of the December 6, 1985 judgment. This is false. Section V of Petitioner's Opening Brief on Appeal is entitled "THE TRIAL COURT DID NOT COMMIT ANY KIND OF ERROR WHATSOEVER IN ITS DECEMBER 6, 1985, ORDER BECAUSE THE LEVYS WERE LEGALLY CHARGEABLE WITH NOTICE OF UNDERWOOD'S VOID TITLE AND THE DEFEASIBILITY OF THEIR OWN TITLE". Throughout this section, Petitioner discussed the merits of the December 6, 1985 order. Understandably, Petitioner did not even attempt to justify his improper conduct in discussing the merits of the December 6, 1985 order, but instead contended that the order was proper and supported by law. Therefore, while the issues upon which the Appellate Court based its ruling may not have been "well" briefed by Petitioner, they were in fact briefed.

c. Petitioner Briefed The Merits Of The December 6, 1985 Judgment And His Unclean Hands In His Reply Brief

Petitioner responded to the issues raised by Respondents in their Brief concerning the merits of the December 6, 1985 order and Petitioner's unclean hands. Petitioner discussed the manner of notice of his motion as well as the grounds upon which the default and default judgment were purportedly void. These grounds are, coincidentally, the same grounds that were argued by Petitioner in his Petition for Rehearing.

In his Reply Brief, Petitioner argued that the default and default judgment were void and set forth the grounds upon which he based his motion to vacate the default and default judgment. Petitioner's Reply Brief states:

> "... (1) the second amended cross-complaint was unlawfully filed on September 16, 1969 and the Summons on the second amended cross-complaint allegedly served on June 24, 1970 and returned to the court on July 3, 1970, was in violation of C.C.P. §581a(a) and by reason thereof, the default and default judgment were both void *ab initio*; (2) the second amended cross-complaint did not pray for interest in the prayer and the request to enter default did not request interest; (3) the request to enter default did not request costs nor did the memorandum of costs include costs;

(4) the file did not reflect that Fleming was ever served personally or by mail with the memorandum of costs when the judgment included an award of costs; (5) the judgment exceeded the prayer, as measured by the body of the complaint." (Reply Brief at 7-8).

Additionally, Petitioner argued at pages 18 through 19 of his Reply Brief that he did not have unclean hands, and, even if he did, this was irrelevant. Petitioner stated:

"Judge George's change of mind is illustrated by the disparate treatment he accorded to the question of the length of time between Underwood's default judgment and Fleming's motion to set aside the default judgment. The Levys complained about the 14-year length of time between the default judgment and the Fleming's motion. . . . However, the 14-year period was specifically raised by Fleming in his motion to set aside the default judgment (CT:22-23). Fleming specifically advised the court that 'A DEFAULT JUDGMENT THAT IS VOID ON ITS FACE MAY BE SET ASIDE AT ANY TIME EVEN 14 YEARS LATER' (CT at 22:18-20), and cited case authority for that position (CT at 22-23; *e.g., Stevensen v. Turner*, 94 Cal.App.3d 315, 156 Cal.Rptr. 499 (1979)). Thereafter, the Court granted Fleming's motion in all respects. Such grant of the motion may well be *res judicata* on

> any issue arising from the 14-year delay. At the very least Judge George's grant of the motion with full knowledge of the delay showed that he had judicially determined that there was no laches; *e.g.*, that the 14-year delay did not prohibit him from exercising his discretion so as to grant Fleming's motion.
>
> When Judge George heard the Respondents' 'clerical error' motion, however, he completely changed his mind on the issue. He asked Fleming's attorney the reason for the 14-year delay. RT 9:2-11:22. The Court then commented that the amount of and reasons for the delay "might have a bearing upon the Court's exercise of discretion." RT 11:23 - 12:1. Then, when the Court gave its ruling from the bench, it found that "Mr. Fleming, and I am speaking of Mr. Fleming as a party and not Mr. Friedlander or his law firm, had no justification for the 11 years of delay in seeking the relief which Mr. Fleming sought in Court with reference to the conveyance from Underwood to Fleming." RT 43:18-24.

Thus, and although his argument was not convincing, Petitioner did brief the issue of his unclean hands.

Furthermore, it is abundantly clear from the above that both of the issues raised by Petitioner in his Petition for Rehearing were briefed with respect to the underlying

appeal and 6herefore, Petitioner's reliance on Government Code § 68081 is improper.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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By:_____
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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on March 31, 1989, I served the within *Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Apellate District, Division Five* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Charles Underwood
19173 Berclair Lane
Tarzana, CA 91356
(3 Copies)

Alan S. Yockelson, Esq.
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Santa Monica, CA 90404
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 31, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)